

Summary of the Paycheck Fairness Act

The Paycheck Fairness Act amends the section of the Fair Labor Standards Act of 1938 (FLSA) known as the Equal Pay Act (EPA) to broaden the enforcement of, and remedies for, sex-based pay discrimination. The legislation also requires the Equal Employment Opportunity Commission (EEOC) and the Department of Labor to meet new data collection requirements and creates a new grant program for training girls and women how to negotiate.

Changes to the Equal Pay Requirements

- Continues to prohibit different wage rates for different employees unless the business satisfies several “bona fide factors,” but revises how the factors apply. The employer would have to demonstrate that the differential: (1) is not sex-based; (2) is job-related; and (3) is consistent with business necessity. The defense does not apply if the employee demonstrates that: (1) an alternative employment practice could have been implemented without creating a wage differential; and (2) the employer refused to adopt the alternative practice.
- Prohibits employer retaliation if an employee inquires about, discusses, or discloses the wages of another employee in response to a complaint or charge.
- Makes employers who violate the law liable for unlimited compensatory or punitive damages.
- Establishes all employees as part of a class action (without their written consent), unless the individual employee submits written notification requesting not to be included.
- Authorizes the Secretary of Labor to seek additional compensatory or punitive damages in a sex discrimination action.

Training Requirements

- Requires the EEOC and the Office of Federal Contract Compliance Programs (OFCCP) to train EEOC employees on matters involving wage discrimination.

Negotiating Skill Training for Girls and Women Grants

- Creates a new competitive grant program for negotiation skills training programs for girls and women. There are no limits on the grant sizes, duration, or renewability.
- Directs the Secretary of Labor and the Secretary of Education to issue regulations on how the negotiating skill training for girls and women should be integrated into the Elementary and Secondary Education Act (No Child Left Behind), the Carl D. Perkins Career and Technical Education Act, the Higher Education Act, the Workforce Investment Act, and other programs.

Department of Labor Studies

- Directs the Secretary Labor to conduct studies and provide information to employers, unions, and the public on ways to eliminate pay disparities between men and women.

Pay Equity in the Workplace Award

- Creates the Secretary of Labor's National Award for Pay Equity in the Workplace to encourage employers to comply with the law. Businesses, partnerships, professional associations, unions, training programs, or any partnership of these groups are eligible.

EEOC Pay Information Data Collection

- Directs the EEOC to determine what wage data would be helpful in strengthening the enforcement of wage discrimination laws and then requires the EEOC to issue regulations on what type of information employers must submit. The data must include pay details on the sex, race, and national origin of employees. There are no prohibitions preventing the EEOC from publically disclosing the data, and the information is subject to Freedom of Information Act requests.

Reinstatement Pay Equity Programs and Data Collection

- Directs the Commissioner of Labor Statistics to collect data on women workers in the Current Employment Statistics survey.
- Directs the OFCCP to reinstate the Equal Opportunity Survey (EO Survey), which was adopted in 2000 and rescinded in 2006. The EO Survey include: detailed information on personnel hiring, compensation practices, and worker tenure and is duplicative of other surveys already in place. The legislative language says that the survey should include pay grade methodology and prohibits the requirement of multiple regression analysis and anecdotal evidence.

Authorization of Appropriations

- Authorizes \$15 million.
- Includes a prohibition on earmarks for the Negotiating Skill Training for Girls and Women grants.

Small Business Provisions

- Directs the Secretary of Labor and the EEOC Commissioner to develop technical assistance materials to help small business implement the law.
- Clarifies that only small business that are exempt from the Fair Labor Standards Act (fewer than two employees or with less than \$500,000 a year in business) are exempt from the Paycheck Fairness Act.

Rule of Construction

- Clarifies that nothing in the law exempts an employer from fully complying with all applicable immigration laws.



The Workplace Unfairness Act of 2010

There are currently two federal laws protecting employees from sex-based pay discrimination: Title VII of Civil Rights Act of 1964 (amended just last year by the Lilly Ledbetter Fair Pay Act); and the Equal Pay Act of 1963 (EPA). Yet Democrats hope to pass a new federal law - [the Paycheck Fairness Act \(PFA\)](#) – during the lame duck session before their majorities erode in the next Congress.

The PFA is based on the assumption that the wage gap between working men and women is a result of employer discrimination. The legislation amends the Fair Labor Standards Act of 1938 (FLSA) to broaden enforcement practices and remedies for intentional and unintentional sex-based pay discrimination, limits the allowable reasons for salary differences between male and female employees, and increases the opportunities for workers to join class action lawsuits.

The PFA will hamstring employers who want to reward diligent workers, making it impossible to base salaries on the quality of work. Ultimately, the PFA will suppress wage growth and hiring at a time when the government should be encouraging the expansion of both. Contrary to its name, the PFA will create unfairness in the workplace.

Sufficient Protection Already Exists

The Democrats' approach to addressing the wage gap is a disproportionate response to a problem that research indicates may not even exist. There is significant evidence that the approximately five to seven percent wage gap may be the result of women preferring non-wage compensation, such as health insurance or fringe benefits, over higher salaries.¹ Moreover, both Title VII and the EPA currently provide a way for those who are discriminated against to file complaints against their employers and pursue financial remedies.² Of the almost 29,000 Title VII and EPA discrimination charges filed in 2009, only 1,375 were found to have reasonable cause.³⁴ And employees with successfully resolved Title VII and EPA discrimination claims in 2009 received more than \$125 million.⁵⁶

In other words, even though only a fraction of the complaints filed with the EEOC are meritorious and tens of millions of dollars were awarded last year for violations of current law, the Democrats want to make it easier to file discrimination charges, regardless of whether or not the claim has any merit.

Limits Employer Salary Decisions

The PFA would change how employers justify salary differences by creating a new EPA standard. The PFA would only allow employers to pay employees different wages if the difference was not sex-based, "job related," and "consistent with business necessity."⁷ Additionally, employers would be required to prove they could not implement an alternative that would produce the same business outcome without creating a difference in salaries.

Under the PFA, if a male employee were the lead on a project and his manager wanted to give him a bonus for completing that project, the manager would not be able to do so without fear of a female employee filing an EPA-related discrimination claim.

Or if a male employee notified his manager that he has a job offer from a different company, the manager might not be able to offer him a salary increase to incentivize him to stay, because the pay discrepancy could expose the employer to claims of discrimination.

In the end, employers would be unable to make salary changes for one employee without fearing a discrimination lawsuit from another, and business decisions could be left in the hands of the courts.

Harms Small Businesses

The PFA would apply to all business that must comply with the FLSA, meaning it applies to all employers except for the very smallest—those with fewer than two employees or those with less than \$500,000 a year in business.⁸ The PFA would expose these small businesses to costly, frivolous lawsuits that could put them out of business.

Both the [U.S. Chamber of Commerce](#) and the [National Federation of Independent Business \(NFIB\)](#) oppose the PFA. The U.S. Chamber's objections extend beyond the impact on existing companies to the broader concern that the PFA "creates a disincentive to do business here in the United States."⁹

Promotes Class Action Lawsuits

Under current law, the EPA requires that employees give written consent to join a class action lawsuit. The PFA would change that, automatically including employees in the class unless they specifically opt out. This would be a boon for trial lawyers, as it would likely increase the number of class action lawsuits filed, make it easier to obtain class certification, and increase the size of the class, even if the discrimination claim is frivolous.

Allows Unlimited Damage Awards

Under current law, employees who win a discrimination claim under the EPA can receive back pay and twice that amount in liquidated damages for a willful violation, but not compensatory or punitive damages. While compensatory and punitive damages are awarded under Title VII, they are only given if there is intentional discrimination, and the award amount is capped at \$300,000. The PFA would not only allow unlimited compensatory and punitive damage awards under the EPA, but also allow payments even when the discrimination was unintentional. The result could be awards that bankrupt a company.

The Real Impact of The Paycheck Fairness Act

If enacted, the PFA would force employers to go on the defensive, stripping them of the freedom to make individually based salary decisions, offer performance bonuses, provide varying pay for working different shifts or at different locations, or create hazard-pay programs without the fear of lawsuits. It would force businesses to purchase expanded legal liability insurance, which would increase their costs and limit business expansion.¹⁰ As the [National Association of Manufacturers](#) said in a November 15, 2010, letter to Senators opposing the PFA, "it is difficult to imagine a scenario in which the bill would not lead to lower wages and fewer jobs."¹¹

In the end, the PFA would further insert the federal government into the private workplace and expose employers to a significant increase in the cost of doing business. Ultimately, all the Paycheck Fairness Act will accomplish is to further stifle wage and job growth at a time when American workers can least afford it.

¹ "An Analysis of Reasons for the Disparity in Wages Between Men and Women" by CONSAD Research Corporation, January 12, 2009, <http://www.consad.com/content/reports/Gender%20Wage%20Gap%20Final%20Report.pdf>.

² Testimony of Jane M. McFetridge on the Paycheck Fairness Act before the U.S. Senate Committee on Health, Education, Labor, and Pensions, March 11, 2010, <http://help.senate.gov/imo/media/doc/mcfetridge.pdf>.

³ U.S. Equal Employment Opportunity Commission Enforcement & Litigation Sex-Based Charge Statistics, FY97-FY09, <http://www.eeoc.gov/eeoc/statistics/enforcement/sex.cfm>.

⁴ U.S. Equal Employment Opportunity Commission Enforcement & Litigation Equal Pay Act Charge Statistics, FY97-FY09, <http://www.eeoc.gov/eeoc/statistics/enforcement/epa.cfm>.

⁵ U.S. Equal Employment Opportunity Commission Enforcement & Litigation Sex-Based Charge Statistics, FY97-FY09.

⁶ U.S. Equal Employment Opportunity Commission Enforcement & Litigation Equal Pay Act Charge Statistics, FY97-FY09.

⁷ The Paycheck Fairness Act (S. 3772), http://thomas.loc.gov/home/gpoxmlc111/s3772_pcs.xml.

⁸ U.S. Department of Labor's Wage and Hour Division PowerPoint on the Fair Labor Standards Act <http://www.dol.gov/whd/flsa/comprehensive.ppt>.

⁹ "Business Community Opposes Paycheck Fairness Act," by Caroline May, The Daily Caller, November 13, 2010 <http://dailycaller.com/2010/11/13/business-community-opposes-paycheck-fairness-act/#ixzz15NEW9g1m>.

¹⁰ National Association of Manufacturers ManuFACTS: The Paycheck Fairness Act, <http://www.nam.org/~media/9363BA8DC26540F2BCFC4E53B2965A3B.ashx>.

¹¹ National Association of Manufacturers Key Vote Letter on The Paycheck Fairness Act (S. 3772), http://www.nam.org/~media/F7A55F0BDD76467991F9EB0B3E2A0CDE/Paycheck_Fairness_Senate.pdf.